

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNY W. DEAN)	
Claimant)	
VS.)	
)	Docket No. 1,044,771
HI LO INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
LUMBERMENS UNDERWRITING ALLIANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 5, 2010 Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

In the February 5, 2010 Order, the ALJ ordered an IME to be conducted by Dr. Do requesting an evaluation, treatment recommendations and an opinion as to causation. The ALJ also found that claimant's notice of accident in May 2008 included the right foot fracture and all of the natural and probable consequences of that accident, including "potential back pain from an altered gait."¹

The respondent requests review of the Order and first alleges the ALJ did not have jurisdiction to proceed with the preliminary hearing based on claimant's failure to comply with K.S.A. 44-534a(a)(1). Second, respondent alleges claimant failed to prove by a preponderance of the evidence that he suffered a low back condition that is causally related to the right foot injury he suffered on May 15, 2008. Accordingly, respondent requests the Board overturn and set aside the ALJ's Order.

The claimant asserts the ALJ determined that claimant's back complaints were a natural and probable consequence of his work injury, that the Board does not have jurisdiction over that issue and, as such, the request for review should be dismissed. In the

¹ ALJ Order (Feb. 5, 2010).

alternative, if the Board determines jurisdiction is proper, the claimant argues the ALJ's Order should be affirmed.

The issues are:

- Whether the ALJ had jurisdiction to proceed to preliminary hearing.
- Whether the Board has jurisdiction to review this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

It is undisputed that claimant injured his right foot while working for the respondent on May 15, 2008. The respondent provided medical treatment for the injury to the right foot. Claimant was treated for the right foot injury at the Ashley Clinic from May 16, 2008, until at least February 12, 2009. During much of this 9-month period claimant was required to wear a CAM boot. Claimant testified wearing the CAM boot altered his gait and he developed pain in his low back. Claimant testified he started experiencing back pain about two months after the accident.² He further testified he reported his back pain to Dr. Martin W. Dillow, who treated claimant's right foot injury at the Ashley Clinic.³ Dr. Dillow's records are silent as to claimant reporting back pain. Claimant was laid off from work on February 25, 2009.

At the request of claimant's attorney, Dr. Edward J. Prostic examined claimant on April 15, 2009. The lumbar spine x-rays reviewed by Dr. Prostic reflected grade 2 to 3 spondylolisthesis at L5-S1.⁴ Dr. Prostic opined that claimant's abnormal gait aggravated the preexisting spondylolisthesis. He also opined claimant needed no further treatment for his right foot. Dr. Prostic recommended conservative treatment for claimant's low back condition.

Respondent argues that the claimant's March 13, 2009 notice of intent letter lacked the specificity required by K.S.A. 44-534a and, further, that other provisions of that statute were not satisfied. Finally, respondent's attorney contends he did not receive a copy of the October 15, 2009 notice of intent.⁵ Consequently, respondent argues the requirements of

² P.H. Trans. at 18.

³ *Id.*, at 14.

⁴ *Id.*, Cl. Ex. 1 at 2.

⁵ *Id.*, Cl. Ex. 2.

the statute were not satisfied and the ALJ had no jurisdiction to proceed to preliminary hearing on February 3, 2010.

The issues raised by respondent are not within the jurisdiction of the Board. The Order of the ALJ has been misread by the parties. The ALJ did not make a determination as to compensability of the injury. The plain language of the Order simply requests an IME by Dr. Do and specifically asks for a causation opinion. In other words, the ALJ determined the need for additional evidence on the causation issue before he could determine compensability. The causation of an injury is part and parcel of the question whether an injury arose out of and in the course of an employee's employment. Thus, no determination of whether the injury arose out of and in the course of the employee's employment was made by the ALJ. Consequently, the issue is not before the Board.

The Order requesting an IME is an interlocutory order as it is neither a preliminary hearing award of benefits entered under K.S.A. 44-534a nor a final award. Consequently, the Board is without jurisdiction to review the Order.

WHEREFORE, the Board finds and concludes the ALJ's Order is not a preliminary hearing order. Instead it is an interlocutory order that the ALJ had the jurisdiction to enter. The request to review the merits of the ALJ's February 5, 2010 Order is dismissed leaving the Order in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge